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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

In re M.S., a Person Coming Under the
Juvenile Court Law.

ALAMEDA COUNTY SOCIAL
SERVICES AGENCY,

Plaintiff and Respondent,

v.

D.S.,

Defendant and Appellant.

A121705

(Alameda County
Super. Ct. No. 0J06003548)

The minor involved in this juvenile dependency case was born prematurely to a mother with substance abuse and mental health problems, and spent her first year of life in the hospital before being released to a foster home. After receiving reunification services for about 20 months, the mother had established a strong reciprocal bond with the minor, but still had not made sufficient progress in complying with her case plan to warrant allowing her to have unsupervised visitation, much less custody. Accordingly, the juvenile court entered an order terminating her parental rights so that the minor could be adopted by her foster parents, subject to a mediated agreement permitting the mother to maintain monthly visits with the minor.

On appeal, the mother contends that the trial court erred in failing to apply the beneficial relationship exception to the statute providing for termination of parental rights. We reject this contention, and affirm the trial court's order.

FACTS AND PROCEDURAL BACKGROUND

Appellant D.S. (mother) is the mother of M.S. (minor), who was born in March 2006. Sixteen days after minor's birth, respondent Alameda County Social Services Agency (the agency) detained her at the hospital where she was born. On March 27, 2006, the agency filed a petition to declare minor a dependent of the juvenile court under Welfare and Institutions Code section 300, subdivisions (b) and (g).¹

The petition alleged the following facts.² Mother has a history of substance abuse and drug-induced psychosis. While she was pregnant with minor, she was receiving disability benefits due to depression, but was not receiving any mental health treatment. Mother used cocaine during her pregnancy, and after heavy use in early March 2006, she went into premature labor, and did not arrive at the hospital in time for it to be stopped. Minor was born premature two days later, after only twenty-four weeks gestation, and weighing only one pound four ounces. At the time of the birth, mother tested positive for both cocaine and marijuana. Minor was medically fragile at the time of her premature birth, and was expected to need several months of hospitalization.

On March 28, 2006, the court ordered the minor detained, and set the matter for hearing on April 12, 2006. The agency's jurisdiction and disposition report for the hearing, which was filed on April 10, 2006, confirmed the allegations of the petition

¹ All further statutory references are to the Welfare and Institutions Code. The allegations against mother were all under section 300, subdivision (b) (failure to protect). The allegations under section 300, subdivision (g) (failure to provide for support) were against minor's alleged father, J.A., who had told mother he wanted nothing to do with the child. The agency was unable to locate him at the address provided by mother, and he never made an appearance in the dependency proceedings.

² The petition was amended on April 17, 2006, but the allegations against mother were essentially the same, except for the deletion of an allegation that she failed to get immediate medical attention when her premature labor began.

regarding mother's substance abuse and mental health problems; stated that minor was still hospitalized and medically fragile; and reported that mother had been visiting minor frequently, though for short times, and that she sometimes displayed inappropriate behavior during her visits. The agency recommended that minor remain detained at the hospital, and that mother be provided with reunification services in the form of outpatient drug abuse treatment, as much visitation as possible with minor at the hospital, parenting education, and therapy. Mother submitted on the report, and did not contest the juvenile court's assumption of jurisdiction over minor. On April 12, 2006, the court sustained jurisdiction; ordered provision of the recommended services; and set a six-month review hearing for September 26, 2006.

The agency filed its six-month review report on September 20, 2006. It reported that minor was still in the hospital. She had gained weight, but still had medical problems including chronic lung disease, required oxygen continuously, and had to be fed partially through a nasogastric tube. Mother visited minor almost daily, and they had developed a strong bond. Mother was comfortable holding and feeding minor, treated her affectionately, and mirrored her gaze. The social worker who observed mother with minor opined that continued frequent visitation with mother would be essential for minor after her discharge from the hospital. The hospital staff was concerned that mother's mental health issues were impairing her judgment and impulse control, but at least some of the time, she was responsive to feedback regarding her treatment of minor, and was able to modify her behavior and be more gentle with minor.

The six-month review report also indicated that mother was participating in outpatient substance abuse treatment, but only sporadically. She had been diagnosed with diabetes, was overwhelmed and depressed, and wanted to receive drug treatment in a less demanding program. Her medications had been reviewed and adjusted in an attempt to alleviate her mood problems and sleep difficulties.

Mother wanted minor discharged from the hospital directly into her care, but the agency disagreed, and recommended that the dependency remain in place, with mother continuing to receive reunification services. The hearing was continued to October 18,

2006.³ On that date, after a hearing, the juvenile court issued an order adopting the agency's recommendations, and setting a further hearing for April 4, 2007.

Due to minor's medical fragility, and the resulting difficulty in finding an appropriate foster home for her, she remained hospitalized until a week after her first birthday in March 2007, with a brief interruption for a foster care placement that proved unsuccessful. At that time, she was finally discharged from the hospital, and placed with foster parents who had received two weeks of training in how to care for her.

Shortly thereafter, on March 29, 2007, the agency filed its 12-month status review report. It reported that mother had proven her commitment to visitation, but was still struggling to meet the other requirements of her case plan. Mother had been visiting with minor regularly—at first twice, and then three times, each week—and was on time or early for every visit. The social worker had observed one visit during which mother fed minor, brought her clothing and toys, and gave the foster mother information about minor's feeding and holding preferences. Mother's behavior was generally appropriate, but the social worker believed that she would benefit from coaching and modeling regarding how to be gentler in her interactions with minor.

Mother was receiving individual therapy, and was keeping more of her appointments, as well as being consistent and reliable in meeting with her social worker. She had changed drug treatment programs, and was participating actively in her new program and in parenting classes, although her attendance at both was irregular. She had been in a car accident in February 2007 and was also struggling with her own recently diagnosed diabetes; the resulting health problems had impeded her ability to participate in treatment.

Meanwhile, minor's medical condition had improved significantly. She was still being fed primarily through a tube, however, and remained at high risk of becoming

³ In the meantime, with mother's consent, the court authorized surgery so that minor's nasogastric feeding tube could be replaced with a gastric tube, which would pose fewer risks to minor's health and be less uncomfortable.

developmentally disabled. She was therefore eligible to receive early intervention services. She was adjusting reasonably well to her foster placement. A concern had arisen that her long stay in the hospital had resulted in emotional problems, and parent-infant dyadic therapy was planned in order to address these issues.

The agency informed the court that mother wished to take custody of minor as soon as possible, but had reluctantly agreed to the agency's recommendation of foster care and continued reunification services for the time being. The foster parents were willing to adopt minor, but the agency believed there was a substantial probability that mother could reunify with her given another six months of services. On April 4, 2007, the juvenile court approved minor's foster care placement and ordered that reunification services continue.

The agency's 18-month status review report, filed on August 31, 2007, reported that over the intervening six months, mother had participated consistently and successfully in weekly dyadic therapy with minor, and cooperated eagerly with a relationship assessment process. She regularly visited with minor three times a week; repeatedly expressed genuine concern for minor's well-being; and maintained regular contact with the social worker and with minor's foster mother, with whom she had a good relationship. The dyadic therapist who observed one of the visits reported that it was beneficial to both minor and mother, and that mother was able to comfort minor when she was in distress, and had demonstrated a strong commitment to strengthening their relationship. Minor had gained weight and improved developmentally; had started to eat solid food, though she still needed supplemental tube feedings; was benefiting from the calm and affectionate environment in her foster home; and was attached both to mother and to the foster parents.

On the other hand, during this period mother failed to participate reliably in any of the services offered to her, other than the dyadic therapy and the visits. She still had a problem with not being gentle enough with minor when she herself was anxious. She was not receptive to participating in the developmental services being provided to minor, characterizing them as unnecessary even after their importance was explained to her. She

had attended only eight out of fifty-four possible days of her outpatient substance abuse program, and only four individual therapy sessions. She had committed in May 2007 to participating in the program at least one day a week, but then had only attended during three out of the ensuing eleven weeks. Most importantly, she still had not been permitted to have unsupervised visits with minor because she had three positive drug tests for cocaine. Because of concerns about mother's ability to keep her commitments and to remain clean and sober, and the lack of evidence that she could safely and adequately meet minor's special needs, the agency could not recommend that minor be returned to mother's care.

Due to the agency's concerns, the 18-month review report recommended, over mother's objection, that services to mother be terminated, and that a section 366.26 hearing be set to establish permanent placement with the foster parents. On September 11, 2007, the trial court set the matter for a contested hearing on November 14, 2007.

During the ensuing two months, mother's participation in substance abuse treatment improved. In its addendum report filed on November 7, 2007, the agency reported that she was actively participating in her outpatient treatment program, and her five most recent drug tests had all been negative.⁴ Mother continued to participate consistently in supervised visitation, maintained good rapport with the foster mother (although there was some concern that mother called her too frequently), and regularly attended minor's medical appointments. Minor demonstrated attachment to mother, sought out mother for comfort when she was distressed, and appeared to find her interactions with mother satisfying. Mother occasionally responded to minor in ways that were not appropriate to minor's cues or that minor found unexpected, but mother was able to overcome these miscommunications.

⁴ As of the date of the addendum report, mother had not had a positive drug test since August 1, 2007. However, she had missed numerous testing dates, and had not been tested since October 24, 2007.

Mother seemed anxious during her visits with minor, however, and found it difficult to allow minor to leave her embrace so she could explore and play. She still needed education and counseling regarding feeding minor and other parenting issues. Moreover, mother's own emotional reaction to her separation from minor, and to the supervision of her visitations with minor, sometimes overwhelmed her to the point of interfering with her ability to interact with minor appropriately.

The 18-month permanency planning hearing was continued, and ultimately took place on December 12, 2007. Although mother had originally objected to the agency's recommendation, by the date of the hearing she had decided to enter a residential treatment program, and therefore submitted on the 18-month review report and did not contest its recommendations. The juvenile court therefore adopted the recommendations, terminated mother's reunification services, selected adoption as the appropriate permanent plan, and set a section 366.26 hearing for April 15, 2008.

The agency filed its section 366.26 report on April 7, 2008, which was a month after minor's second birthday. It confirmed that mother had entered a residential treatment program on December 20, 2007. While in the program, mother was afforded an hour and a half of supervised visitation per week. Mother's interactions with minor continued to be affectionate and generally positive, although mother occasionally seemed overwhelmed by her circumstances, including the potential termination of her parental rights. Minor appeared to enjoy her visits with mother, but she reportedly cried when she saw the social worker who brought her to the visits, and was agitated and tired when she returned to the foster mother afterwards.

The report opined that although minor had a loving relationship with mother, it was not a parental one, and continuing it was not vital to minor's emotional well-being. The report noted that all of mother's visits with minor had been supervised, and that she had never provided minor with day-to-day care. Mother had made progress in her efforts to deal with her substance abuse issues, but it had taken her a long time to engage fully in treatment, and during the time she was receiving reunification services, she had not been able to provide consistent negative drug tests.

Minor was benefiting from the stable environment in the home of her foster parents, who loved her and had provided her with excellent care. They were seeking to adopt minor, but they understood that her relationship with mother was beneficial, and were willing to continue it as long as it was safe and appropriate to do so. Minor continued to make medical progress, and her feeding tube had been removed and she was able to eat solid food. She was developmentally delayed, but understood language and was making progress toward speaking.

On April 15, 2008, mother made a *Marsden* motion (*People v. Marsden* (1970) 2 Cal.3d 118), which the juvenile court granted, and new counsel was appointed for her. As a result, the section 366.26 hearing was continued to May 16, 2008.

On May 1, 2008, mother filed a section 388 petition, by which she sought to modify the court's order setting the section 366.26 hearing, and to have minor placed with her in the residential parent-infant program in which she had enrolled on April 16, 2008. In support of the petition, mother submitted a letter from her substance abuse counselor from her previous program, dated April 7, 2008, attesting that mother had progressed well in that program, had received negative results on 13 drug tests between January 1 and April 6, 2008, and was expected to graduate from treatment in June. The dyadic therapist who had treated mother and minor reported that minor "demonstrates some clear attachment behaviors with her mother," engaged in mutually satisfying interactions with mother, and was distressed at the end of their visits, and that mother was working to manage her own emotions at those times for minor's benefit. The trial court denied the modification petition without a hearing, on the same date it was filed, for insufficient evidence of changed circumstances.

On May 12, 2008, the agency filed an addendum to its earlier report. It explained that minor had visited mother twice at her residential treatment program. One of the visits was supervised by a social worker, who reported observing "appropriate and positive interactions" between minor and mother.

The dyadic therapist supervised the second visit, which also went well. The therapist opined, however, that she did not feel mother "would be able to parent [minor]

at this point.” She was not sure mother “would ever be able to appropriately parent a child,” and did not support mother’s bid to maintain her parental rights. The therapist explained that “mother becomes overwhelmed with her own emotions and this gets in the way of her attending to [minor’s] needs.” Mother responded well to the therapist’s intervention, but had “a hard time using what she learns at other times,” and the instances when mother was able to read minor’s cues were “the exception rather than the rule.” Moreover, mother told the therapist that she wanted to seek to gain custody of minor in a year, by which time mother believed minor would “be old enough to testify about where she wants to be.” The therapist viewed this as “an example of how . . . mother’s own needs prevent her from seeing or understanding what [minor’s] needs are.”

The “evaluation” section of the report opined that mother had not demonstrated that she had the ability to put minor’s needs (including minor’s need for a permanent family) ahead of her own wants and needs, as a parent should. It opined that it was in minor’s best interests to be adopted by her foster parents. It also stated that the “foster parents understand that having and [*sic*] ongoing relationship with her birth mother would be beneficial to [minor],” and that they were “willing to facilitate continued contact between [minor] and [mother].”

The section 366.26 hearing was held on May 16, 2008. Mother’s former substance abuse counselor again attested to the positive interactions she had observed between mother and minor. Mother testified regarding her visits with minor and the development of their bond; her love for minor, and her desire to parent her and learn all about her needs and habits; the parenting training she had received; her participation in the dyadic therapy; and her commitment to continuing in her recovery from substance abuse. She acknowledged, however, that she had never been able to have minor visit her at her home without another adult present, and that minor had only recently called her “mommy” for the first time.

The primary adoption worker testified that minor saw her foster parents as her parents, and experienced mother only as an additional familiar person in her life with whom she had a loving relationship, not as a mother. He reported that minor was upset

when she had to end a visit with mother, but was at least equally upset when she was taken away from the foster mother to go to a visit. He opined that it would be detrimental to minor if she were not adopted by the foster parents. He did not believe that minor would derive any benefit from continuing her relationship with mother beyond the benefit that a child would generally derive from a loving relationship with an extended family member or other adult.

At the conclusion of the hearing, the juvenile court declined to find that minor would benefit from continuing her relationship with mother to the extent that would be required to justify maintaining mother's parental rights rather than permitting the foster parents to adopt minor. Nonetheless, the court accepted the proposal of mother's counsel, to which the agency did not object, that mother and the foster parents be referred to mediation to try to work out a post-adoption visitation agreement.

By the date of the next hearing, May 28, 2008, the mediation had resulted in an agreement under which mother would have visitation with minor once a month, and could call the prospective adoptive mother once a week. The court found by clear and convincing evidence that minor was likely to be adopted, terminated mother's parental rights, and adopted the terms of the mediated agreement. This timely appeal ensued.

DISCUSSION

On appeal, mother argues that terminating her parental rights would be detrimental to minor, and that minor would benefit from continuing their relationship. We review the court's decision rejecting this contention for substantial evidence. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.)⁵

⁵ We recognize that Division Three of this court has applied the abuse of discretion standard to decisions regarding exceptions to termination of parental rights under section 366.26, subdivision (c)(1), rather than the substantial evidence standard applied by other decisions. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351; see *In re Autumn H.*, *supra*, 27 Cal.App.4th at pp. 575-576.) We find it unnecessary to resolve this issue because we find that substantial evidence supports the court's determination.

Mother's argument is based on a provision in section 366.26, the relevant portions of which mandate that: "(b) At the hearing [under this section], . . . the court . . . shall make findings and orders in the following order of preference: (1) Terminate the rights of the parent or parents and order that the child be placed for adoption. . . . (c)(1) A finding . . . that the court has continued to remove the child from the custody of the parent or guardian and has terminated reunification services, shall constitute a sufficient basis for termination of parental rights . . . *unless (B) [t]he court finds a compelling reason for determining that termination would be detrimental to the child* due to one or more of the following circumstances: (i) The parents have maintained regular visitation and contact with the child and *the child would benefit from continuing the relationship.*" (§ 366.26, subds. (b) & (c), as effective from Jan. 1, 2008, to Dec. 31, 2008, italics added.) We will refer to the exception to the termination of parental rights provided for in section 366.26, subdivision (c)(1)(B)(i) as the beneficial relationship exception.⁶

The juvenile court determines whether a parent has established the beneficial relationship exception by balancing "the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575; accord, *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1342.) On the other hand, "[t]he juvenile court may reject the parent's claim [under the beneficial relationship exception] simply by finding that the relationship maintained during visitation does not benefit the child significantly enough to outweigh the strong preference for adoption." (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.) Thus, the question here is whether mother has shown that continuing her parent-child relationship with minor would promote minor's well-being to

⁶ Prior to the amendment of section 366.26 effective January 1, 2008, the beneficial relationship exception was codified in section 366.26, subdivision (c)(1)(A). (See Stats. 2007, ch. 583, § 28.5.)

such a degree as to *outweigh* the benefit that minor would gain from being placed in a permanent home with an adoptive family. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826-827.)

Courts have interpreted the beneficial relationship exception to require more than the incidental benefit which is inherent in “ ‘[i]nteraction between natural parent and child’ ” (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1345, citing *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) To meet the burden of proof for the beneficial relationship exception, the parent must show more than frequent and loving contact, an emotional bond with the child, or pleasant visits. (*In re Derek W.*, *supra*, 73 Cal.App.4th at p. 827.) The parent must show that he or she has a *parental* role in the child’s life, resulting in a significant, positive emotional attachment from child to parent. (*Ibid.*; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.)

“[T]he [beneficial relationship] exception does not permit a parent who has failed to reunify with an adoptable child to derail an adoption merely by showing the child would derive some benefit from continuing a relationship maintained during periods of visitation with the parent.” (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1348.) “[A] parental relationship is necessary for the exception to apply, not merely a friendly or familiar one. . . . ‘While friendships are important, a child needs at least one parent. Where a biological parent . . . is incapable of functioning in that role, the child should be given every opportunity to bond with an individual who will assume the role of a parent.’ . . .” (*Id.* at pp. 1349-1350, citing *In re Brittany C.* (1999) 76 Cal.App.4th 847, 854, italics omitted.)

Here, mother maintained regular visitation both during reunification services and even after they were terminated, and is to be commended for doing so. It is obvious from the record that mother genuinely loves minor, and struggled to overcome the obstacles to her becoming minor’s custodial parent. It is also evident that mother’s relationship with minor was warm and friendly, and that minor derived some benefit from their visits and from the relationship.

It is equally clear, however, that mother has never occupied a truly parental role in minor's life. Mother was offered a plethora of reunification services for well over 18 months, starting almost immediately after minor's birth in March 2006. Yet by the time those services were terminated in December 2007, mother still had not made sufficient progress in dealing with her mental health and substance abuse issues to be able to qualify to receive unsupervised visitation with minor, much less physical custody of her.

As one court has noted, the showing required to invoke the beneficial relationship exception is "difficult to make in the situation, such as the one here, where the parents have essentially never had custody of the child nor advanced beyond supervised visitation." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51.) Here, because mother's contact with minor was always limited to supervised visitation, mother has never been in a position to provide minor with "the sort of consistent, daily nurturing that marks a parental relationship." (*In re Derek W., supra*, 73 Cal.App.4th at p. 827.) Mother has played a role in minor's life since birth, but that role has never gone beyond that of a caring friend or relative. In contrast, the record contains ample evidence that minor does have a parental relationship with her foster parents, who have been responsible for her day-to-day care since she was able to leave the hospital, and who want to adopt her and provide her with a permanent home.

We commend the trial court for facilitating the mediation of a post-adoption agreement that will permit mother to continue to play a role in minor's life. Our review of the record convinces us, however, that the trial court was also correct in determining that this case does not qualify for application of the beneficial relationship exception. Because there is substantial evidence supporting that determination, the trial court's order terminating mother's parental rights must be affirmed.

DISPOSITION

The order appealed from is affirmed.

Ruvolo, P.J.

We concur:

Reardon, J. Sepulveda, J.